United States Department of Labor
Employees' Compensation Appeals Board

A.C., Appellant	)	
and	)	**Docket No. 15-354**
	)	**Issued: June 8, 2015**
DEPARTMENT OF THE AIR FORCE, ROBINS AIR FORCE BASE, Warner Robins, GA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 26, 2014 appellant filed a timely appeal from a September 15, 2014 merit decision and an October 8, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained an injury in the performance of duty on April 16, 2014; and (2) whether OWCP

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the October 8, 2014 nonmerit decision, OWCP received additional evidence. Appellant also submitted new evidence with her appeal to the Board. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

properly refused to reopen her case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On June 5, 2014 appellant, then a 52-year-old international logistics specialist, filed a Form CA-1 traumatic injury claim alleging that on April 16, 2014 she injured her left knee while walking to her vehicle as she was leaving for lunch. The injury occurred at 11:15 a.m. outside the front of Building 302. Debra Ball, appellant's supervisor, indicated on the Form CA-1 that appellant had called her from her vehicle crying and saying that her knee gave out while she was on her way to lunch. She went to appellant's vehicle to check on her and appellant told her that something had popped/shattered in her left knee, leaving her in severe pain.

Along with the claim, OWCP received several CA-7 and CA-7a forms claiming wage loss, medical requests for therapy, a letter authorizing therapy, position descriptions, and work excuses/restrictions from July 22 through August 11, 2014.

By letter dated August 11, 2014, OWCP advised appellant that, when her claim was first received, it appeared to be a minor injury that resulted in minimal or no lost time from work. As the employing establishment did not controvert continuation of pay or challenge the merits of the case, payment of a limited amount of medical expenses was administratively approved; however, the merits of the claim were not formally adjudicated. OWCP advised appellant of the deficiencies in her claim and requested that she submit additional factual and medical evidence. Appellant was afforded 30 days to submit the requested information.

In an August 18, 2014 statement in response to an OWCP development questionnaire, appellant stated that she reported her injury to her supervisor when it occurred on April 16, 2014. She stated that she was walking outside to put her purse in her car and when she stepped up onto the curb in front of her car onto the sidewalk, she heard something pop/crack behind her left knee. It caused excruciating pain and she could not walk. There were no witnesses. She hopped on her right leg to the front of the building where she works and some maintenance guys carried her on both sides to her car and found her supervisor. Appellant went to the doctor that same day. In response to OWCP's question as whether she had a history of knee problems prior to April 16, 2014, appellant answered "no." She stated that she was able to walk prior to her injury, but could not walk after her injury. Appellant also noted that the April 17, 2014 magnetic resonance imaging (MRI) scan showed she had a torn meniscus and needed surgery.

Medical reports from Middle Georgia Orthopedic Surgery and Sports Medicine dated April 9 to September 2, 2014 were received along with a June 13, 2014 operative report, several work restriction forms, and CA-7 and CA-7a forms.

In an April 9, 2014 report, Dr. K. Scott Malone, a Board-certified physiatrist, noted that appellant had left knee pain symptoms for approximately two months which appeared to be worsening. He noted that appellant stated that she has had pain in her knee and foot before, but no injury, and examination and x-ray findings were provided. An impression of left patella femoral syndrome (PFS)/chondromalacia, knee pain, knee enthesopathy infrapatella/subpatellar and effusion knee were provided. A conservative treatment plan was implemented and appellant received a steroid injection.

In an April 16, 2014 report, Dr. Malone noted that appellant was walking to her car when she felt a pop and her knee gave out at 11:00 a.m., that day. He noted that the character of appellant's complaint had not changed, but symptoms had worsened since her last visit. Left knee examination revealed moderate swelling, range of motion limited by pain, and moderate medial joint line patellofemoral pain. An impression of knee pain and torn meniscus degenerative unspecified was provided. Appellant received a steroid injection and an MRI scan was ordered.

In an April 21, 2014 report, Dr. William B. Wiley, a Board-certified orthopedic surgeon, noted that the onset of symptoms was sudden after an injury occurred on April 16, 2014 at work. Appellant related that she was walking from the building where she worked to her car when she felt a cracking in her knee. Dr. Wiley noted that her symptoms have been present for one month, but had improved. Examination findings of the left knee revealed swelling, but no ecchymosis or deformity with decreased strength and decreased range of motion and generalized tenderness with an effusion and crepitus. Dr. Wiley related that the April 17, 2014 MRI scan of the left knee showed a torn medial meniscus and chondromalacia. An impression of left knee pain with torn medial meniscus and chondromalacia, knee pain, torn meniscus lateral anterior horn, and torn meniscus medial posterior horn was provided. A left knee arthroscopy partial medial meniscectomy and chondroplasty was recommended.

Appellant underwent the proposed surgery on June 13, 2014, which Dr. Wiley performed. Postoperative reports dated June 20 through September 20, 2014 were provided.

By decision dated September 15, 2014, OWCP denied the claim on the grounds that the factual component of fact of injury had not been established as the evidence did not support that the injury and/or event occurred as described. It noted that appellant described the cause of injury on the CA-1 form as "walking to car" but stated in her August 4, 2014 statement that she stepped up onto the curb in front of her car when she heard something pop/crack behind her knee. Additionally, OWCP noted that she did not relate that she had prior knee problems.

On October 2, 2014 OWCP received a handwritten statement from appellant dated September 29, 2014, accompanied by a duplicate copy of the appeal request form. Evidence received with the request included: two copies of her September 29, 2014 appeal request form and a copy of OWCP's August 11, 2014 letter.

In a September 29, 2014 letter, Dr. Malone stated that appellant had been treated for left knee pain. A review of her history revealed treatment for left knee patellafemoral syndrome; left patella chondromalacia; left knee enthesopathy infrapatella/subpatella and left knee effusion. However, it was reported on April 16, 2014 that appellant was walking to her vehicle while working at the employing establishment and felt a "pop" in her left knee and her left knee gave out. The incident was reported to the employing establishment that day and appellant requested to be seen by Dr. Malone for this injury as she was already undergoing treatment under her private health insurance. Dr. Malone stated that his April 16, 2014 examination revealed worsening symptoms of increased pain and swelling, and limited range of motion. He diagnosed left knee torn meniscus, which was correlated by the April 17, 2014 MRI scan. Appellant was referred to Dr. Wiley, who performed a left knee arthroscopic medial meniscectomy, partial lateral meniscectomy, and chondroplasty on June 13, 2014. Dr. Malone opined that the injury appellant sustained on April 16, 2014 was consistent with her reported injury and his clinical assessment.

By decision dated October 8, 2014, OWCP denied appellant's reconsideration request without merit review as the new evidence failed to address the factual component of fact of injury.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed are causally related to the employment injury.[3] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[4]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place, and in the manner alleged. Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[5]

An employee's statement that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[6] Moreover, an injury does not have to be confirmed by eyewitnesses. The employee's statement, however, must be consistent with the surrounding facts and circumstances and his or her subsequent course of action. An employee has not met his or her burden in establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. Circumstances such as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may, if otherwise unexplained, cast doubt on an employee's statement in determining whether a *prima facie* case has been established.[7]

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[8] An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.[9] Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence providing a diagnosis or

[3] *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

[4] *Michael E. Smith*, 50 ECAB 313 (1999).

[5] *T.H.*, 59 ECAB 388 (2008).

[6] *R.T.*, Docket No. 08-408 (issued December 16, 2008); *Gregory J. Reser*, 57 ECAB 277 (2005).

[7] *Betty J. Smith*, 54 ECAB 174 (2002).

[8] *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

[9] *See Shirley A. Temple*, 48 ECAB 404, 407 (1997); *John J. Carlone* 41 ECAB 354, 356-57 (1989).

opinion as to causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the specified employment factors or incident. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.[10]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not established that she injured her left knee on April 16, 2014. As noted, an employee's statement alleging that an incident occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[11] Appellant's account of the April 16, 2014 incident was inconsistent throughout the case record. On the CA-1 claim form, filed almost two months after the alleged injury, appellant stated that she injured her knee when walking to her vehicle while on her way to lunch. In her August 18, 2014 statement, she advised that the injury occurred when she stepped up onto the curb in front of her car onto the sidewalk. The day of the alleged incident, Dr. Malone reported in his April 16, 2014 report that appellant was walking to her car when her knee gave out. While appellant received prompt medical attention, she did not file her traumatic injury claim until almost two months after the alleged incident and when OWCP asked her to provide additional factual information, she omitted that she had prior claims concerning her left knee while Dr. Malone's April 9, 2014 report noted that she had a two-month history of left knee symptoms. Also, where OWCP's development questionnaire asked specifically whether appellant had a history of knee problems before her alleged April 16, 2014 injury, appellant answered "no." The Board, therefore, finds that an employment incident did not occur on April 16, 2014, as alleged. Thus, appellant has not met the first component of fact of injury.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[12] OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.[13] To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[14] When a claimant fails to meet one of the above standards, OWCP

[10] *I.J.*, 59 ECAB 408, 415 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[11] *See Tina M. Parrelli-Ball*, 57 ECAB 598 (2006); *see Y.S.*, Docket No. 08-440 (issued March 16, 2009).

[12] 5 U.S.C. §§ 8101-8193. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

[13] 20 C.F.R. § 10.606(b)(2). *Susan A. Filkins*, 57 ECAB 630 (2006); *see J.M.*, Docket No. 09-218 (issued July 24, 2009).

[14] *Id.* at § 10.607(a). *Robert G. Burns*, 57 ECAB 657 (2006); *see S.J.*, Docket No. 08-2048 (issued July 9, 2009).

will deny the application for reconsideration without reopening the case for review on the merits.[15]

ANALYSIS -- ISSUE 2

Appellant's request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law.

In support of her reconsideration request, appellant submitted Dr. Malone's September 29, 2014 letter in which he reported that on April 16, 2014 appellant was walking to her vehicle while working at the employing establishment and felt a "pop" in her left knee and her left knee gave out. He noted that this incident was reported to the employing establishment on April 16, 2014 and that she requested to been seen by him as she was already undergoing treatment under her private health insurance. Dr. Malone noted his April 16, 2014 examination findings. He stated that his diagnosis of a left knee torn meniscus was correlated by the April 17, 2014 MRI and appellant underwent a left knee arthroscopic medial meniscectomy, partial lateral meniscectomy and chondroplasty on June 13, 2014. Dr. Malone opined that the injury appellant sustained on April 16, 2014 was consistent with her reported injury and his clinical assessment.

While Dr. Malone's report gives some support to appellant's allegation that the April 16, 2014 incident occurred, it is insufficient to establish that it occurred at the time, place, and in the manner alleged. As previously noted, appellant gave an inconsistent account of how the April 16, 2014 alleged incident occurred and omitted some pertinent information concerning her left knee in response to OWCP's development questionnaire.

Other evidence submitted in support of appellant's request including two copies of her appeal request form and a copy of OWCP's August 11, 2014 letter were duplicative. Thus, the Board finds that appellant's request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied a specific point of law.

Appellant may submit new evidence or argument as part of a formal written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that the evidence does not support that an incident occurred as alleged on April 16, 2014 and OWCP properly denied appellant's reconsideration request without merit review.

[15] *Supra* note 11; 20 C.F.R. § 10.608(b).

ORDER

IT IS HEREBY ORDERED THAT the October 8 and September 15, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 8, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board